LOH SHAK MOW v. PUBLIC PROSECUTOR WONG HOI PING, ALAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Chua J.) August 19, 1986]

[Singapore – Magistrate's Appeals Nos. 126 & 127 of 1985]

Criminal Law and Procedure – Charges of abetment of cheating, criminal breach of trust and dishonestly retaining stolen property – Bucketting of clients' orders – Misuse of company funds – Whether prima facie case made out – Whether secondary evidence wrongly admitted – When can an appellate court reverse the findings of trial Judge – Misjoinder of trial – Effect of – Penal Code (Cap. 103), ss. 109, 409, 411 & 420 – Criminal Procedure Code (Cap. 113), s. 175.

Penal Code (Cap. 103), ss. 109, 409, 411 & 420 – Cheating, criminal breach of trust and dishonestly retaining stolen property – Charges of abetment – Bucketting of clients' orders – Misuse of company funds.

Criminal Law and Procedure – Misjoinder of trial – Effect – Sentences manifestly excessive.

Evidence – Secondary evidence – Admissibility – Evidence Act (Cap. 5), ss. 61-65.

Company Law – Misuse of company funds.

The first appellant Loh Shak Mow met one Lee Kwong Fai of Broadview Finance Pte. Ltd. of Hong Kong (BVF). Lee Kwong Fai was the Chairman of BVF. BVF was a registered member of the Hong Kong Commodities Exchange Ltd. In Hong Kong both Lee and Loh discussed setting up a company in Singapore to trade in spot gold and gold futures. In April 1981 Loh and Lee incorporated a commodities firm in Singapore called Broadview Commodities Pte. Ltd (BVC) in order to trade in spot gold, gold and gold futures and other commodities.

The second appellant, Alan Wong Hoi Ping, was then practising as an advocate and solicitor in the firm of Lee & Lee. He was engaged in March 1981 to incorporate BVC. BVC was incorporated in April 20, 1981. Thereafter the second appellant became the chairman and director of BVC. Two weeks after its operations had started both Lee and Loh became aware that BVC was getting low profits. Therefore sometime in June 1981, Loh and Lee decided to "bucket" clients' orders which meant that BVC was to retain the margin deposits paid by these clients without placing their orders on the market at the various international exchanges and was to meet the clients' orders itself. It kept the commissions paid to BVC on each lot of orders and also absorbed all their clients' losses in gold trading as its own profits. They succeeded in doing this without being discovered by their clients and brokers by adopting various measures. The secret profits derived from the bucketing operations of BVC were shared amongst the directors. To avoid detection of these drawings, documents were manufactured and accounting books adjusted to give the impression that the monies were remitted to BVF in Hong Kong as payment of margin deposits or that they were returns of loans made by the directors of BVC.

The first appellant was charged with and convicted on six charges of abetment of cheating under section 420 read with section 109 of the Penal Code (Cap. 103) and fourteen charges of criminal breach of trust as an agent under section 409 of the Penal Code. The second appellant was charged with and convicted on three charges of criminal breach of trust as an agent and one charge of dishonestly retaining stolen property. Both appellants appealed against their convictions and sentences.

Held: (1) having regard to the evidence, the trial Judge was entitled to find that the first appellant and Lee Kwong Fai were in fact engaged in a conspiracy to cheat and that subsequently they secreted the proceeds of the cheating by disguising them as margin payments to BVF and then obtaining the money unlawfully through all these means and putting them into their respective bank accounts as evidenced by the bank documents;

(2) on the evidence adduced, distinct offences of abetment of cheating and criminal breach of trust were committed by the first appellant. The acts alleged constituted offences falling within two separate definitions of law by which offences are defined or punished. The provisions of the Criminal Procedure Code permit the first appellant to be charged and tried at one trial for each of those offences;

(3) the law regarding the functions of an appeal court when dealing with a question of fact in which questions of credibility are involved is clear. In an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the appeal court must, in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. In this case, having regard to the evidence, the decision of the trial judge was not wrong. The appeal of the first appellant against conviction should be dismissed;

(4) having regard to the first appellant, the sentences imposed were manifestly excessive in the circumstances. The sentences should be set aside and substituted with a sentence of two years' imprisonment on each charge, the sentences on the first two charges to run consecutively and the sentences on the other charges to run concurrently, making a total of four years' imprisonment;

(5) it was for the trial Judge to decide whether the two accused should be tried together or separately. The discretion must be exercised judicially. The usual tests applied to decide whether different acts are parts of the same transaction (to bring it within section 175 of the Criminal Procedure Code) are proximity of time, unity of place, unity of purpose or design and continuity of action. In the present case, all the six charges of abetment of cheating which the prosecution elected to proceed against Loh Shak Mow were before the first criminal breach of trust charge against the appellant. There was no proximity of time and no unity of purpose and continuity of action;

(6) the trial judge did not consider the case on the basis of the evidence admissible against each accused separately. He treated the second appellant as a conspirator in a conspiracy with which he was not charged and in which he was not named;

(7) a joint trial should not have been ordered as it was not fair and just to the appellant and the joinder has occasioned a failure of justice. The second appellant's convictions must be quashed.

Cases referred to:

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 3 All E.R. 14. ; [1981] 2 M.L.J. 49.
(2) *Abdul Ghani* v. *Public Prosecutor* [1985] 1 M.L.J. 93.
(3) *A. D. Caldeira* v. *F. A Gray* [1936] M.L.J. 137.
(4) *Public Prosecutor* v. *Loh Ang Sing* [1965] 2 M.L.J. 129.

MAGISTRATE'S APPEAL.

Gilbert Gray Q.C. (*Peter Fernando* with him) for the first appellant.

Michael Sherrard Q.C. (*Kan Ting Chiu* with him) for the second appellant.

Loke Yoon Kee (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chua J. : The first appellant, Loh Shak Mow, and the second appellant, Alan Wong Hoi Ping, were jointly tried and convicted by a District Court and sentenced to terms of imprisonment. They now appeal against their convictions and sentences.

The first appellant was convicted of:

(a) Six charges of abetment of cheating (DAC 3874/83 – 3879/83), under sections 420 and 109 of the Penal Code, Chapter 103, by conspiring with one Lee Kwong Fai and diverse others to cheat clients of Broadview Commodities Pte. Ltd. various sums of money totalling $1,928,988.88 between December 1981 and August 1982, by deceiving them into believing that their gold trading orders would be placed with authorised international gold exchanges and thereby inducing them into paying monies into Broadview Commodities Pte. Ltd. The clients cheated were:

(1)	Mdm Chew Swee Poh	$1,062,862.47 (DAC 3874/84)
(2)	Mdm Chew Swee Poh	$80,000.00 (DAC 3875/84)
(3)	William Tsai Chao Shaun	$312,128.26 (DAC 3876/84)
(4)	Lee Tow Kiat	$221,034.95 (DAC 3877/84)
(5)	Lee Tow Kiat	$15,263.20 (DAC 3878/84)
(6)	Michael Choo Kok Lin	$237,700.00 (DAC 3879/84);

and

(b) Fourteen charges of criminal breach of trust as an agent (DAC 2536 to 2549/84), under section 409 of the Penal Code, Chapter 103, of monies totalling $1.7 million over which he had dominion as a director of Broadview Commodities Pte. Ltd.

The second appellant was convicted of:

(a) Three charges of criminal breach of trust as an agent (DAC 2559 to 2562/84) of various sums of money totalling $93,340 over which he had dominion as a director and chairman of Broadview Commodities Pte. Ltd. in August and December 1982; and

(b) One charge of dishonestly retaining stolen property (DAC 2560/84), to wit, monies amounting to $169,703.17 in the possession of Broadview Commodities Pte. Ltd. in October 1982.

The first appellant was sentenced to terms of imprisonment totalling 6 years and the second appellant was sentenced to terms of imprisonment totalling 12 months.

The short facts are these. The first appellant (Loh) carried on his own shipping business, State Carriers & Transportation Pte. Ltd. (State Carriers), in Singapore. In February 1981 he went to Hong Kong and there, through a friend, he met Lee Kwong Fai (PW 4) of Broadview Finance Pte. Ltd. of Hong Kong (BVF).

Lee Kwong Fai (Lee) was the Chairman of BVF and his father Lee Kum and his friend Sylvia Leung (PW 5) were two of the directors. BVF was a registered member of the Hong Kong Commodities Exchange Ltd. and both Lee and Sylvia were allowed to trade in spot gold and gold futures with the Hong Kong Commodities Exchange Ltd.

In Hong Kong, Lee and Loh discussed setting up a Company in Singapore to trade in spot gold and gold futures. Lee then came to Singapore and had further discussions with Loh.

In April 1981, Loh and Lee incorporated a Commodities firm in Singapore called Broadview Commodities Pte. Ltd. (BVC) in order to trade in spot gold, gold futures and other commodities.

Alan Wong Hoi Ping (Alan Wong) was then practising as an advocate and solicitor in the firm of Lee & Lee. He was engaged in March 1981 to incorporate BVC. BVC was incorporated on April 20, 1981, with Loh and Lee holding one million shares each.

The staff of BVC comprised most of Loh's former employees in State Carriers, including Eileen Lim (PW 8), Abdullah bin Abdul Hadi (PW 9), Chen Ah Kong (PW 10), Vincent Lim (PW 7), Carol Ng (PW 13) and various employees of Lee at BVF Hong Kong, which included Eliza Leung (PW 2), Sylvia Leung (PW 5), Kelvin Ngai (PW 3) and Ho Yuen Tin. The Hong Kong staff came to Singapore to assist the BVC staff in gold dealing, documentation and in the preparation of accounts in connection with gold trading.

By December 1981 relationship between Loh and Lee had became strained. Lee then invited Alan Wong to be a director and chairman of BVC. In December 1981 Alan Wong became the chairman and a director of BVC. On that date Lee and Loh each transferred 100,000 $1 shares to him. On December 9, 1981, he received another 100,000 shares from each of them. None of these shares were ever paid for. Lee and Loh held 40% each of the shareholding of BVC and Alan Wong 20% Alan Wong was also made a signatory of BVC cheques.

In July 1982 Alan Wong went to the Philippines to prepare and set up a company in Manila called BV (Philippines) Incorporated (BVP). The shareholders were, amongst others, Loh, Lee and Alan Wong.

In 1980 or 1981 Lee had started a trading company called Linkrich and in September 1982 Loh and Alan Wong became directors. Loh and Alan Wong had 600,000 shares each, Lee 599,999 and BVF 199,999 shares.

Matters between Lee and Loh came to a head in February 1983. Sylvia Leung (Sylvia) was sent to Singapore by Lee on February 18, 1983. Lee said she was to balance the accounts in respect of BVF. On February 19, 1983, Sylvia went to the office of BVC and Loh alleged that Sylvia had "stealthily used the telex" and had taken away copies of the telex. Loh, accompanied by a few members of his staff, including Vincent Lim, proceeded to the Dynasty Hotel and asked her to return the copies of the telex. There was an argument which resulted in the police being called. By this time Alan Wong had arrived. They all went to the Central Police Station where a report was lodged against Sylvia and she was arrested. As a result of that report police investigations were conducted. After Sylvia was charged in Court she assisted the police in their investigations into the accounts of BVC.

The facts as found by the trial Judge on the evidence adduced by the prosecution are these.

At the time of BVC's incorporation, it was falsely represented to the Registrar of Companies by Loh and Lee that the Company had a paid-up capital of S$2 million.

The assets of State Carriers sold by Loh to BVC were grossly overstated or fraudulently stated in order to make up part of its paid-up capital of $560,000. The balance of $1.4 million was made up of false margin receipts (Ex P. 108) to support a purported payment by BVC to BVF in Hong Kong of margin deposits for commodity futures trading. At most the paid-up capital was only $88,997.85.

As regards the margin receipts (Ex P. 108) which were dated from April 21, 1981, to May 25, 1981, for sums totalling S$1.4 million, there was an exchange of letters and telexes in respect of these receipts in a clever attempt to give the impression that margin deposits of $1.4 million were in fact paid in Hong Kong into BVF.

Clients of BVC who were interested in trading in gold futures were required, *inter alia*, to execute a General Agreement for Customer Accounts. Under the Agreement, orders placed by clients to purchase or sell futures and commodities were to be executed by BVC, as brokers, through brokerage commission houses and international exchanges including the Hong Kong Chinese Gold and Silver Exchange Society, the New York Commodity Exchange (COMEX) and Chicago Board of Trade (CBOT). Before being allowed to trade, clients had to pay margin deposits against orders made by them. They were also required to top-up deposits when these were depleted due to trading losses.

Before the gold trading operations began at BVC, Lee explained to Loh three methods of dealing in gold – operating as a commission house, operating partly as a commission house and partly marrying orders where BVC would buy from or sell to the client, and only marrying orders. After discussion Loh agreed to the method of marrying orders after it was explained to him that the profits by such a method would be greater but there would be a corresponding increase in financial risks. Both Loh and Lee agreed that for the time being they would operate BVC as a commission house as BVC then had no cash.

When BVC began its operations on May 18,

1981, it channelled the orders of its clients, but without informing them, through Sun Hung Kai Acli at various times to help BVC place clients' orders and to confirm these orders. BVC earned only a commission from the orders.

After two weeks, it became clear to both Loh and Lee that these commissions were insufficient to meet the operating expenses of BVC as the Company had to pay commissions and margins to Sun Hung Kai Acli for the execution of clients' orders. This led to a quarrel between Loh and Lee over the low profits.

Sometime in June 1981, Loh and Lee decided to "bucket" clients' orders, which meant that BVC was to retain the margin deposits paid by these clients without placing their orders on the market at the various international exchanges and was to meet the clients' orders itself. It kept the commissions paid to BVC on each lot of orders and also absorbed all their clients' losses in gold trading as its own profits. This meant that the directors of BVC were essentially gambling against their own clients. They succeeded in doing this without being discovered by their clients and brokers by adopting various measures.

Clients and brokers were not permitted to enter the operations room. BVC produced telex messages of BVF in Hong Kong purportedly confirming that clients' orders had been placed as requested on the international exchanges. Dealers such as Kelvin Ngai and Abdullah bin Abdul Hadi wore headphones to give the impression that they were receiving the prices of gold from the international exchanges. On one occasion Andy Loho Bun (PW 1) an employee of BVF in Hong Kong, was persuaded by Loh to pretend to be an announcer on the New York COMEX floor to make various announcements of price movements and market conditions.

To reduce the financial risks of such an enterprise, the staff of BVC who operated as dealers were taught to manipulate clients' orders to ensure that clients would suffer losses or earnings with reduced profits.

Prices were largely manipulated by the manner in which the bid and ask prices were announced by the dealers including Lee, Kelvin Ngai and later Abdullah bin Abdul Hadi, who maintained charts of price movements and were in a better position to study market trends.

In May 1982, after Kelvin Ngai left Singapore, to return to Hong Hong, Abdullah bin Abdul Hadi took over as the gold dealer. By that time he was fully aware that BVC was taking positions against its clients as regards trading orders in gold futures. He continued with the trading practice of confirming clients' orders in Singapore and obtaining confirmatory telexes from Hong Kong to convince the clients that the orders had been placed when they were not. The orders were confirmed in less than a minute.

Both the Hong Kong staff and the Singapore staff of BVC knew of the Company's bucketting operations and that there had been no actual trading between BVC and BVF as held out to the clients. It is not possible to believe that Loh, a director of BVC who was in charge of the office, could not have known that the Company was taking positions against its own clients.

As the dealers were in fact gambling with their clients, it was important that they had up-to-date information as to the Company's financial position. For this reason a secret Positions Book was maintained by Rosalind Lee (PW 6) who was employed as an accounts clerk at BVC from April 1981. This book contained such details as how much was owed to clients, money at hand at BVC, money in the bank and the position as regards floating loans and profits. It was only accessible to the dealers and the BVC's directors Lee, Loh and Alan Wong and to some of the accounts staff including Eliza Leung and Sylvia Leung. This book was shown to Loh and Lee everyday before trading commenced.

Because BVC was taking positions against its own clients, a company investment account was opened partly to conceal clients' margin deposits retained in the bucketting operations. The margin deposits were used to pay the Company's expenses and were also shared between the directors as profits. Some of the funds in the company's investment account were used to trade with commission houses such as Sun Hung Kai Acli to cover some of the clients' orders in case BVC lost when taking positions against them.

From the account books kept by BVC it is plain that the bucketting operations were lucrative for BVC and brought about enormous profits. From these bucketting operations the Company made a profit of $19,870.56 in May 1981 which rose to $359,089.58 in January 1982. Between January and September 1982 the profit was $6,604,266.20. During this period, if clients' orders

amounting to $8.7 million had not been bucketted, BVC would in fact have lost $393,992.10.

Between July 7, 1981, and August 31, 1982, Madam Chew Swee Poh (PW 15) deposited with BVC as margin deposits $1,062,862.47 in order to trade in gold futures. Between August 18, 1982, and August 25, 1982, she opened another trading account in the name of her son's fiancee and lost $80,000.00.

Believing that their gold trading orders would be placed with authorised international gold exchanges, William Tsai paid into BVC $312,128.26 between May and August 1982, Lee Tow Kiat (PW 16) paid $236,298.15 between August 28, 1982, and December 13, 1982, and Michael Choo (PW 14) paid $237,700 between March 11, 1982, and August 13, 1982.

In July 1981 Lee discovered that Loh had made use of Company's monies for his personal matters. This and other matters, including problems between Loh and Kelvin Ngai in respect of whose conduct Lee was compelled to execute an indemnity on the December 15, 1981, strained the relationship between Loh and Lee which led to Lee (after consulting Loh) inviting Alan Wong to be a director of BVC to provide a check on Loh's use of Company funds.

The evidence of Lee was that when he invited Alan Wong to be a director of BVC he informed Alan Wong that BVC had no working capital, that the paid-up capital of $2 million was false, to which Alan Wong replied "To open a casino when will it close down." According to Lee, Alan Wong remarked: "Have you seen a casino close shop?" Later he also explained the gold trading operations of BVC and asked Alan Wong if it was unlawful not to put clients' orders in the market as it was in Hong Kong. Alan Wong asked to see the Hong Kong Securities Act. Subsequently after seeing the Act Alan Wong replied that it was not unlawful as there was no commodities trading law in Singapore unlike that in Hong Kong.

When the first lot of shares of BVC was being transferred to Alan Wong at the office of the accountants Wong & Teo, Loh too informed Alan Wong that the Company had no money and was gambling with its clients. Alan Wong was subsequently shown the operations room and was told of the methods of operation and he again confirmed that it was not an offence not to put clients' orders through the market.

In December 1981 Alan Wong became the Chairman and director of BVC. Lee ceased to be Chairman of BVC and on December 22, 1981, he returned to Hong Kong and sent Ho Yuen Tai to Singapore to assist Kelvin Ngai.

Sometime in mid-January 1982, Kelvin Ngai and Ho Yuen Tai went to the law firm of Lee & Lee to see Alan Wong. He took cheques for Alan Wong's signature and also showed him the secret Positions Book maintained by BVC. Alan Wong was also given a clients' margins list which showed the monies of the clients, their account numbers and their effective margins or floating losses. Alan Wong examined both the documents. Subsequently the three of them went to a coffee-house at the DBS Building. There Kelvin Nagi asked Wong whether bucketting was illegal in Singapore to which Alan Wong replied that it was not.

From Alan Wong's first statement to the police, he was aware at least by April 1982 that BVC was engaged in bucketting or was taking positions against its own clients. In his statement to the police on August 5, 1983, Alan Wong spoke of two resolutions dated April 13, 1982 and April 16, 1982, relating to loans made by Loh and Lee to BVC totalling $1.5 million. He said he was told by Loh and Lee that the Company was short of funds and that they were loaning the money to the Company free of interest but did not explain how the shortage came about but hinted that the Company lost money through taking positions.

In August 1982 Loh obtained information that the Monetary Authority of Singapore (MAS) was about to raid the offices of BVC and was at least going to check BVC's accounts. Loh then instructed the staff of BVC to photo-copy all important accounts and trading documents, including clients' ledger cards, trading balance sheets, daily business reports and record of clients' effective margins. This enabled BVC to continue with operations despite the fact that the MAS had carted away all its books and records when BVC's office was raided on September 29, 1982.

Loh also requested Lee to come to Singapore to help him to prepare accounts for the benefit of MAS. Lee arrived in Singapore on August 12, 1982, and met both Loh and Alan Wong. The three of them then discussed how the accounts could be rewritten and irregularities in the keeping of records and books corrected for the benefit of MAS. Sylvia Leung and her sister Eliza Leung were recalled to Singapore from Hong Kong to

supervise the rewriting of the account books of BVC. They were responsible for preparing false trading statements to give the impression that actual trading had taken place between BVC and BVF.

There was wilful destruction of evidence to prevent the MAS from discovering the offences of cheating and criminal breach of trust committed by the directors of BVC. Telexes and investment ledger cards were destroyed; accounting books and documents including general ledgers and investment ledger cards were rewritten; payment vouchers and margin receipts were falsified; Company resolutions were invented. Alan Wong signed two of these resolutions dated April 13, 1982 and April 16, 1982.

The result was that the MAS raid did not result in the discovery of either the defalcations of Loh and Alan Wong or the bucketting of clients' orders. The accounts and supporting documents had been so prepared that on the surface they appeared to have been properly kept. On the instructions of Loh the BVC staff did not reveal the truth as to the trading operations of BVC to the MAS investigators.

By December 1982 Lee decided to sell his shares in BVC. By January 1983 the relationship between Loh and Lee had further deteriorated. On January 18, 1983, Sylvia Leung came to Singapore to inform Loh that BVF wished to terminate its arrangements with BVC and requested him to get a buyer for Lee's shares in BVC. To persuade Loh to sever BVC's ties with BVF, she informed him that BVF was in financial difficulties and that if it ceased business the reputation of BVC would also be affected. She suggested that it would be better if both parties mutually terminated the Agreement. As a result, Loh instructed Alan Wong to write the letter of termination (Ex D. 33) and to serve it on Sylvia Leung. However, there were further disputes between Lee and Loh and Alan Wong over the price of Lee's shares in BVC. Their relationship became worse.

Around February 18, 1983, Sylvia Leung telephoned Loh from Hong Kong and told him that she was coming to settle the accounts between Lee and Loh. She arrived in Singapore on February 18, 1983. She met a very angry Loh who told her that he would not be able to find another company like BVF which would assist BVC in bucketting clients' orders. Sylvia Leung had come to Singapore to square the accounts between BVC and BVF. Lee had sent her to reduce the false margin deposits purportedly held by BVF on behalf of BVC which, on the face of the record, showed a debt by BVF of more than S$600,000.

Following her arrival in Singapore, Sylvia Leung attempted to square accounts by sending false telex orders showing trading losses of $620,400 without the knowledge of Loh and Alan Wong. Later when Loh discovered this, he confronted her at the Dynasty Hotel with a few members of his staff. A commotion that followed resulted in the police being called by the hotel staff. This led to Sylvia Leung's arrest on a charge of forgery under section 468 of the Penal Code. Police investigations that followed resulted in Loh and Alan Wong being charged.

OFFENCES OF CRIMINAL BREACH OF TRUST (CBT)

The evidence is that the secret profits derived from the bucketting operations of BVC were shared amongst the directors in proportion to their shareholdings – 40-40-20. To avoid detection of these drawings, documents were manufactured and accounting books adjusted to give the impression that the monies were remitted to BVF in Hong Kong as payment of margin deposits or that they were returns of loans made by the directors to BVC.

CBT CHARGES AGAINST LOH SHAK MOW – FIRST CHARGE

The evidence was this. On February 23, 1982, a cash cheque (Ex. P.51) for $100,000 was drawn on BVC's account at the Bangkok Bank. It was signed by Loh and Ho Yuen Tin, who was then Lee's representative in Singapore. A payment voucher (Ex. P.51B) of the same date described the $100,000 as payment to BVF and stated that it was "remittance to Hong Kong." The cheque was cashed by Ho Yuen Tin in Singapore on February 23, 1982, at 2.44 p.m. $50,000 was in turn deposited into Loh's personal account with the Development Bank of Singapore (DBS) 7 minutes later. The balance $50,000 was remitted to Lee and deposited in his personal current account with the American Express Bank in Hong Kong on February 27, 1982. A false margin receipt was issued (Ex P.51A) dated February 23, 1982, (the date of the cheque) by BVF signed by Sylvia Leung (on the instructions of Lee) for HK$27,226.60, the then equivalent of S$100,000. The margin receipt was dated February 23, 1982, when the

monies were only received in Hong Kong on February 27, 1982.

SECOND CHARGE

The evidence was this. On March 9, 1983, a cash cheque for $100,000 (Ex P.52) drawn on BVC's account with the Bangkok Bank was prepared by Rosalind Lee on Loh's instructions. It was signed by Ho Yuen Tin and Rosalind Lee. The cheque was cashed by Ho Yuen Tin at 2.20 p.m. on the same day and half the amount $50,000, was deposited in Loh's account with DBS 10 months later. The other $50,000 was remitted to Hong Kong and credited to Lee's personal account with the American Express Bank. Again, the BVC bank payment voucher described the drawing of the $100,000 as payment to BVF from BVC as "remittance to Hong Kong." It was thus prepared by Rosalind Lee as Loh had instructed her to treat this amount as a margin deposit. Similar false entries also appear in BVC's ledge account and cash book. A false margin receipt was issued by BVF for HK $2,272,731.08 (the then equivalent of $100,000) signed by Sylvia Leung dated March 9, 1982, two days before even the monies were in fact received in Hong Kong by Lee on March 11, 1982.

THIRD CHARGE

The evidence was this. On March 12, 1982, another cash cheque (Ex P.53) for $100,000 was drawn on BVC's account with the Bangkok Bank. The cheque was cashed the same day at 2.33 p.m. Sixteen minutes later, a sum of $50,000 was deposited into Loh's personal account with the DBS. However, a bank payment voucher (Ex P.53B) issued by BVC stated that the $100,000 was remitted to Hong Kong by Ho Yuen Tin to BVF. A false margin receipt (Ex. P.53A) was issued by BVF signed by Sylvia Leung for HK $270,773.36.

FOURTH CHARGE

The evidence was this. On March 23, 1982, a cash cheque (Ex P.54) for $100,000 was drawn on BVC's account with the Bangkok Bank on Loh's instruction and it was signed by Ho Yuen Tin and Rosalind Lee. Rosalind Lee was told by Loh to treat it as a margin receipt to BVF. It was cashed in Singapore on the same day at 2.37 p.m. and 10 minutes later a sum of $49,000 was deposited into Loh's DBS account. $50,000 was remitted to Lee.

False accounting documents were prepared: (1) showing that the $100,000 was remitted to BVF as margin deposit; (2) a margin receipt (Ex P.54A) showing that BVF received HK $273,597.40 (S$100,000) margin deposits signed by Sylvia Leung in August 1982 and backdated to April 16, 1982; (3) a payment voucher dated March 23, 1982, (Ex P.54B) which was signed by Eliza Leung in August 1982 and in March 1982 as she was then not in Singapore.

FIFTH CHARGE

The evidence was this. On April 2, 1982, another cash cheque (Ex P.55) for $100,000 was drawn on BVC's account with the Bangkok Bank on Loh's instructions. It was signed by Ho Yuen Tin and Rosalind Lee. The bank payment voucher (Ex P.55B) dated April 1, 1982, which was approved by Loh who signed on it, indicated that the $100,000 was "remittance to Hong Kong by Mr. Ho Yuen Tin" and the payee was BVF. The cheque, however, was cashed in Singapore on April 2, 1982, at 2.56 p.m. Twenty-three minutes later $49,000 was deposited in Loh's personal account with the DBS. On April 6, 1982, the remaining S$50,000 was paid into Lee's personal account with the American Express Bank in Hong Kong.

SIXTH CHARGE

The evidence was this. On April 22, 1982, a cash cheque for $400,000 (Ex P.56) was drawn on BVC's account with the Hong Kong & Shanghai Banking Corporation (HSBC). The cheque was signed by Loh and Kelvin Ngai. The two of them then cashed the cheque on the same day. Sixteen minutes after the cheque was cashed, Loh deposited $190,000 into his personal account with the DBS. Another $200,000 was sent by Kelvin Ngai by telegraphic transfer to BVF's account at the HSBC in Hong Kong. The entire sum was taken out the same day and credited to Lee's personal account with the HSBC Hong Kong. However, the payment voucher (Ex P.56B) issued by BVC, which was "approved" by Loh, made it appear that the whole of the $400,000 was paid to BVF as "trading loss."

SEVENTH CHARGE

The evidence was this. On April 27, 1982, a cash cheque for $200,000 (Ex P.57) was drawn on BVC's account with the HSBC, Singapore. The cheque was signed by Ho Yuen Tin and Loh. It was cashed on the same day and $100,000 was

deposited into Loh's personal account with the American Express Bank and the remaining $100,000 was sent to Lee in Hong Kong and credited to his personal account with the American Express Bank in Hong Kong.

Despite the fact that the whole of the $200,000 had been distributed equally between Loh and Lee, the bank payment voucher (Ex P.57B) issued by BVC described that sum as payment to BVF in respect of a "trading loss" and a margin receipt (Ex P.57A), also dated April 27, 1982, purported to show that the entire sum of S$200,000 (HK $549,024.60) was received by BVF.

EIGHTH CHARGE

The evidence was this. On May 14, 1982, another cash cheque of $100,000 (Ex P.58) was drawn on BVC's account into the HSBC, Singapore. It was signed by Ho Yuen Tin and Loh. A bank statement voucher (Ex P.58B) of the same date stated that the $100,000 was "payment for remittance to Hong Kong" with the payee named as BVF. The voucher was approved by Loh, whose signature appears on it. However, the cheque was cashed on the same day at 10.32 a.m. and 24 minutes later half the amount, $50,000, was banked in Loh's personal account with the DBS. The other half, $50,000, was sent to Lee in Hong Kong and credited to his personal account with the HSBC, Hong Kong.

A false margin receipt was issued by BVF (Ex P.58A) dated May 13, 1982, signed by Sylvia Leung, purported to show that the entire sum of $100,000 (HK$274,174.92) was received by BVF. The cheque itself was cashed on May 14, 1982, a day later.

NINTH CHARGE

The evidence was this. On July 13, 1982, another cash cheque (Ex P.59) for $60,000 was drawn on BVC's account with the HSBC. It was signed by Ho Yuen Tin and Loh. A bank payment voucher (Ex P.59B), also dated July 13, 1982, stated that this sum was "remittance to Hong Kong as trading deposit." However, $30,000 was deposited into Loh's personal account with the DBS and the remaining $30,000 was sent by telegraphic transfer to BVF and this sum was subsequently deposited into Lee's personal account. Again a false margin receipt (Ex P.59A) for HK$163,010.54 (S$60,000) signed by Sylvia Leung was issued by BVF.

ELEVENTH CHARGE

The evidence was this. On August 31, 1982, a cash cheque (Ex P.61) for $300,000 was drawn on BVC's account with HSBC. It was signed by Lee Kwong Fai and Rosalind Lee. The bank payment voucher (Ex P.61A) issued by BVC stated that the said sum represented a "deposit to BVF" and that this sum was received by Lee Kwong Fai. Both Lee Kwong Fai and Loh signed the voucher as having approved it and Lee Kwong Fai also signed as the recipient of the $300,000. Entries in both BVC's Cash Book II and the General Ledger give the appearance that the $300,000 was paid to BVF.

The cheque was cashed in Singapore on the same day by Lee Kwong Fai who was accompanied by Loh. After the cheque was cashed Lee Kwong Fai took half the amount and gave the other half to Loh. In his statement to the police Loh did not deny receiving the money but stated that he was paid because he had "at times" settled Lee Kwong Fai's gambling debts.

TWELFTH CHARGE

The evidence was this. On September 17, 1982, S$356,800 (HK$1 million) was sent to BVF from BVC's account at the HSBC on Loh's instructions. This telegraphic transfer was authorised by Alan Wong, Lee Kwong Fai and Rosalind Lee whose signatures appear on the telegraphic transfer form (Exs P.62 and P.62A). A copy of the telegraphic transfer form (Ex P.62A) was used as a bank payment voucher. This remittance of $356,800 was treated as a margin deposit to BVF in BVC's books on Loh's instructions to Rosalind Lee. A false margin receipt (Ex P.62B) dated September 16, 1982, for HK$1 million was issued by BVF signed by Sylvia Leung who forged the signature of one Stella So.

On the same day another cheque (Ex P.62C) drawn on BVF's account with HSBC in Hong Kong for HK$1 million was issued to one Kenny Hioe. This cheque was then deposited on September 17, 1982, into the personal account of one Kenny Hioe in the Citibank.

It was not in dispute that Kenny Hioe was a friend of Loh. The HK$1 million was deposited into Kenny Hioe's account on Loh's instructions and was to be used to pay for the shares of Lee and Loh in Artapala, a new gold trading company that they had intended to form in Hong Kong.

By October 4, 1982, BVC monies equivalent to HK$2 million had been paid into Kenny Hioe's bank account in Hong Kong. The entire sum was returned to Kenny Hioe through a Citibank cheque and was duly acknowledged in writing by Loh and Lee on October 13, 1982. Loh's bank statement from the Citibank for October 1982 (Ex P.63G) and a bank deposit slip (Ex P.63G) show that the sum of HK$2 million was paid into Loh's account on October 13, 1982. According to Lee, he did not receive any portion of it as Loh kept the HK$2 million and said that he would retain it on behalf of Lee for safe-keeping.

CBT CHARGES AGAINST BOTH LOH SHAK MOW AND ALAN WONG

(The tenth charge against Loh and the first charge against Alan Wong)

The evidence was this. On August 25, 1982, a cash cheque (Ex P.60) for $200,000 was drawn on BVC's account with HSBC. The cheque was signed by Alan Wong and Rosalind Lee. The purpose of the drawing was falsely stated in the bank payment voucher (Ex P.60A), dated August 25, 1982, as "being payment for returning to Loan Account." The payee was stated as Lee. This payment was approved by Alan Wong who signed in the column "Approved by" in the payment voucher Ex P.60A. Lee signed the voucher as the recipient of the $200,000.

The cheque Ex P.60 was cashed on the same day at 2.38 p.m. at the HSBC at Robinson Road by Lee and Loh. Lee took $80,000 and another $80,000 was deposited into Loh's personal account with the DBS Shenton Way where Alan Wong was paid his share of $40,000 and this sum was paid into Alan Wong's personal account with the DBS 27 minutes after the cheque was cashed. The distribution of the $200,000 was proportionate to the shareholdings of Loh, Lee and Alan Wong in BVC: 40%-40%-20%.

When questioned by the police Loh's response to this charge was the same as that for the third charge, namely, that these monies were gambling debts that were being settled by Lee.

Alan Wong made various statements to Supt. Bakar Moosa and to ASP Henry Soh (PW 19) between August 1, 1983, and March 7, 1984. He at first denied having received any money other than his director's fees. He also insisted that he was unaware if BVC made any profits in 1981 and 1982. In his statement under Notice of Warning, he admitted he had received the $40,000 which he stated were "the mid-year profits of the Company."

THIRTEENTH CHARGE AGAINST LOH SHAK MOW AND THE SECOND CHARGE AGAINST ALAN WONG

The evidence was this. On October 4, 1982, a sum of S$700,000 (HK$2.046 million) was sent by telegraphic transfer (Ex P.63) to BVF in Hong Kong from BVC's account with the HSBC. The telegraphic transfer was signed by Lee and Rosalind Lee. Prior to this Loh had telephoned Sylvia Leung in Hong Kong and had instructed her to deposit HK$1 million in Kenny Hioe's account when she received the HK2.046 million, and to put the balance in Alan Wong's account with the Hang Lung Bank in Hong Kong. Sylvia Leung was furnished by telex with Alan Wong's account number with the Hang Lung Bank in Hong Kong. Loh's instructions to his accounts clerk at BVC, Rosalind Lee, was to treat the $700,000 as margin deposits to BVF. False margin receipts (Ex P.63AB) were subsequently issued by BVF.

On the same day (October 4, 1982), a cash cheque (Ex P.63B) for HK$1 million was drawn on BVF's account with the HSBC, Hong Kong. The cheque was cashed and a cashier's order for the same amount was purchased in the name of Kenny Hioe. On October 5, 1982, HK$1 million was deposited in Kenny Hioe's account with the Citibank.

The balance of HK$1.046 million was then withdrawn from BVF's account with the HSBC, Hong Kong, by the use of a cash cheque (Ex P.63J) dated October 4, 1982. This was in turn used to purchase a cashier's order (Ex P.63K) for the same amount of HK$1.046 million in the name of Alan Wong on October 5, 1982. This sum was paid into Alan Wong's personal account with the Hang Lung Bank in Hong Kong.

On October 9, 1982 Loh and Alan Wong went to BVF's offices in Hong Kong. There they filled up share transfer forms as Lee had intended to transfer some of his shares in a Hong Kong Company called Linkrich to Loh and Alan Wong. Linkrich was a trading company which Lee had started in 1980 or 1981 and which had done some import and export business. A certified copy of the Change of Particulars of Directors shows that on October 9, 1982, Lee declared a change of directors and shareholders in that Loh and Alan

Wong had been appointed directors on September 1, 1982. According to this Declaration, Loh and Alan Wong had 600,000 shares each in Linkrich, with Lee retaining 599,999 and BVF the remaining 199,999 shares.

Later in the morning of October 9, 1982, Loh and Alan Wong with Sylvia Leung proceeded to the Hang Lung Bank in Hong Kong where Alan Wong maintained a personal account. Alan Wong then drew a cash cheque (Ex P.63) on his account at the bank for HK$1.046 million, the amount that had been credited to his account on October 5, 1982, by Sylvia Leung from the HK$2.046 million remitted from BVC by Loh. Loh had asked Alan Wong to make out the cash cheque and pay the cash into Linkrich account as people could not trace where the cash had come from. The entire sum of HK$1.046 million was then used by Alan Wong to open a bank account for Linkrich Ltd.

Upon receiving a cheque book for the Linkrich account, Alan Wong immediately issued another cash cheque (Ex P.63P) drawn on the Linkrich account and withdraw HK$500,000. This amount was then deposited in his personal account with the Hang Lung Bank. Alan Wong then left instructions with Sylvia Leung, to whom he gave his calling card on which was written his DBS Singapore account number, to send by telegraphic transfer the HK$500,000. (S$169,713.17) to his account in Singapore. This was done and the equivalent of S$169,713.17 was credited to Alan Wong's account in Singapore on October 12, 1982. (This is the second charge against Alan Wong).

Loh, who had remained in Hong Kong, issued another cheque (Ex P.63W) to himself on October 12, 1982, drawn on the Linkrich account and withdrew HK$200,000. This sum was then deposited into his personal account with the Citibank, Hong Kong. Lee similarly withdrew HK$200,000 from the Linkrich account.

Loh, in his statement to the police, did not deny that out of the $700,000 remitted from BVC to BVF on October 4, 1982, a total sum of $393,487.83 was taken by him.

In his police statement, Alan Wong explained that in late August 1982 Loh and Lee had requested him to remit the equivalent of 2 million pesos as capital for Broadview (Philippines) and that this sum was supposed to be a loan from him to the Company. Loh and Lee had guaranteed repayment. Accordingly, he remitted S$517,000 (2 million pesos) to Broadview (Philippines). In October 1982 he had been paid HK$500,000 (S$170,000) "as part reimbursement of my loan of S$517,000" either by Lee or Sylvia Leung in Hong Kong and had then remitted the amount to his account with the DBS Singapore.

Fourteenth Charges against Loh Shak Mow and the Third and Fourth against Alan Wong

The evidence was this. On December 10, 1982, on Loh's instructions, Rosalind Lee sent by telegraphic transfer (Ex P.64) S$133,000 (HK$400,000) to BVF. Loh led her to believe that the sum represented a margin deposit to be placed with BVF but no margin receipt was ever issued by BVF. In fact it was a drawing of Lee from BVC. This sum was credited to the account of BVF at the HSBC on December 11, 1982. Loh asked Sylvia Leung (who was then in Singapore) to check if there were sufficient funds in the Company's account to pay him and Alan Wong as well.

Loh was, like Lee, to receive $133,000 and Alan Wong 20% of all drawings. According to Sylvia Leung, Loh, however, insisted that Alan Wong was to receive 20% of $266,600 or the total amount that had been drawn by Lee and Loh. After checking the accounts of BVC with the Mitsui Bank and the HSBC, Sylvia Leung thought that there was $150,000 in the Mitsui Bank and $37,000 in the HSBC. Rosalind Lee therefore prepared a cheque (Ex P.65) for $37,000 on BVC's account with the HSBC. This cheque was signed by Rosalind Lee and Alan Wong. The accompanying payment voucher (Ex P.65A), also dated December 13, 1982, and signed by Sylvia Leung in Singapore, falsely held out the $37,000 payment as "margin deposit" to BVF. Similar false entries were also made in BVC's Cash Book and Ledger.

Sylvia Leung said that she did not cash the cheque for $37,000 although she endorsed it at Loh's request. Loh informed her that Alan Wong had requested her assistance in this regard. On December 13, 1982, after endorsing the cheque Ex P.65 she gave the cheque back to Loh. However, the particulars entered on the reverse of this cheque (Ex P.65) show that the cheque was cashed on December 14, 1982, at 2.35 p.m. Fifteen minutes later, at 2.50 p.m., a sum of $35,000 was deposited into Alan Wong's DBS account.

On December 13, 1982, Rosalind Lee prepared

another cash cheque (Ex P.66) for $150,000 on BVC's account with the Mitsui Bank. This cheque was signed by Alan Wong and Rosalind Lee. BVC's payment voucher for this sum could not be traced by the prosecution. There is, however, an entry in the Cash Book on December 13, 1982, which states payment voucher as "220/12." According to Sylvia Leung, the particulars recorded on that voucher too were that it was a payment as "margin deposit."

Sylvia Leung's evidence was that she cashed the cheque Ex P.66 and handed the $150,000 to Loh. After having had lunch with Loh and Alan Wong she returned to the office of BVC. At about 4 p.m. when Alan Wong came to BVC she entered Loh's room and told Loh that from the $150,000 she had given him, he had to give Alan Wong $16,340 and another $330 to Lee. She then saw Loh take some money out of his pocket and handed the money to Alan Wong who returned some change. Loh then handed to her $330 which he asked her to take to Hong Kong for Lee.

A DBS deposit slip (Ex P.66A) and Loh's DBS bank statement for December 1982 show that a sum of $145,000 in cash was deposited into Loh's account on December 14, 1982.

From the $133,000 sent by telegraphic transfer Ex P.64 to BVF, the Mitsui Bank cash cheque Ex P.66 for $150,000 and the HSBC cash cheque Ex P.65 for $37,000, totalling $320,000, Lee received $133,000, Loh $133,300 and Alan Wong $53,340.

Loh did not deny in his statements to the police that he had taken the monies stated in any of the fourteen charges of criminal breach of trust.

Alan Wong had, when questioned by the police during the earlier interviews, denied having received any profits or other payments from BVC, apart from his director's fees. It was on September 6, 1983, that he admitted that he had received dividends from BVC and that the $35,000 cash deposited into his bank account on December 14, 1983, "could have been the dividend from BVC received by me in December 1982 and possibly handed over by Sylvia." He also stated that the Mitsui Bank cheque Ex P.66 for $150,000 was "the end of the year declaration of dividends."

In respect of the $16,340 (the subject of the third charge) Alan Wong stated in his statement under Notice of Warning that he was "not aware whether this sum was paid to me or for what purpose."

At the end of the prosecution case, Mr. Gilbert Gray, QC, counsel for Loh submitted that the direction given by Lord Diplock in *Haw Tua Tau* v. *Public Prosecutor*[1] as to the test to be applied when dealing with a submission of "no case to answer" was clearly wrong and that despite Lord Diplock's direction the duty of the Court to determine whether the prosecution has established a *prima facie* case beyond reasonable doubt remains.

The District Judge shared counsel's view that Lord Diplock's directions were clearly in error, but said that he was bound by the directions as the Singapore Court of Criminal Appeal has since ruled in *Abdul Ghani* v. *Public Prosecutor*[2] that the directions of Lord Diplock are not *obiter* and are binding on all Courts in Singapore.

Having considered the totality of the prosecution evidence the District Judge was clearly of the view that the prosecution had established a *prima facie* case which, if unrebutted, would warrant the conviction of both the accused on all the charges that they were being tried. He, therefore, called on them to make their defence.

DEFENCE OF LOH SHAK MOW

Loh testified on oath that in February 1981 he had met Lee in Hong Kong. Lee had said that he had five to six years' experience in gold trading and was one of the leaders in the Hong Kong Exchange and that he wanted to incorporate a gold trading Company in Singapore. Subsequently, in the same month, Lee came to Singapore and met Loh, Alan Wong and the managing director of Golden Hope, a gold trading Company. After they had observed gold trading at the premises of Golden Hope, Lee and Loh agreed to form a gold trading Compay. His own Company, State Carriers, was not doing well because of the slump in the shipping business. As Lee could not obtain office premises for the new gold trading Company, he suggested that State Carriers cease business and that its premises be used for the new Company to be called Broadview Commodities (BVC).

He told Lee that he wanted $550,000 for State Carriers' assets. He admitted that State Carriers had never paid $70,000 for renovation nor for the other assets stated in the list of assets. He denied giving any instructions in the preparation of the list of assets or even of having seen it. He agreed that the authorised capital of $2 million of BVC was to be made up of $1 million from

himself and $1 million from Lee. As Lee had accepted a valuation of State Carriers's assets at $500,000, the balance was to be paid in cash. He raised over $200,000 in cash and borrowed another $20,000 from a Hong Kong friend.

$1.44 million including his $400,000 was placed with BVF Hong Kong as margin deposits (Ex P.108). He denied that the margin receipts that were issued by BVC in respect of the $1.44 million were false documents. According to him, it was not possible for the margin receipts to be false because a Company which was as large as BVF "would not give out margin receipts 'anyhow'." He also relied on the exchange of letters (Exs P.109 and P.109A) and telexes (Exs P.110 and P.110A) between himself and BVF.

Lee had assured him that BVF would be an agent for BVC and that BVF would place all the Singapore orders in other markets and confirm these orders as quickly as possible. BVC had begun its operations on May 20, 1981, initially with Sun Hung Kai Acli in Singapore. The hot-line telex between BVC and BVF was set up in June 1981 and when orders were sent out on the telex, he was told that BVF would send the orders to other broking firms.

He stated that on April 13, 1982, it had been resolved that BVC would accept a loan of $700,000 from him and Lee – $350,000 each. On April 16, 1982, another loan of $400,000 each was given as working capital. These loans were given because BVF had wanted margins and margin receipts were issued in Hong Kong.

As soon as he came to know Lee, the two of them used to gamble at poker, horse-racing, mahjong and all kinds of gambling. In April or May 1982 Lee owed him over S$1 million.

In September 1982, he and Lee decided to set up another Hong Kong Company called Linkrich to deal in canned goods and trade between China and the Philippines. Subsequently, with some friends in Hong Kong, he and Lee had wanted to set up another gold futures Company in Hong Kong with a capital of HK$7 million and between themselves Lee and Loh were to pay HK$2 million. When the Company was not incorporated, the $2 million was eventually paid into his bank account in Hong Kong because "Kenny Hioe paid Lee who repaid me what he owed me."

Loh further testified that in 1982 he contacted Far East Computers to set up a computer system for all accounts at BVC. As the Computer Company needed to look into the account books constantly and some of these books were always wanted in the BVC office, he had given instructions for them to be photocopied. He denied that these were prepared for purpose or that he had instructed anyone to rewrite or destroy accounting books. He had only instructed frivolous telexes which stated "good morning" and contained love messages to be destroyed and he put the operations room in order as telexes had all been placed at random in the operations room. When a telex was sent by BVC to BVF a copy of the message would be available to BVF. Similarly BVF would have a copy of their telexes sent to BVC. Copies of any incriminating telexes would therefore be available in Hong Kong.

He never asked Lee or Eliza Leung to come to Singapore to assist him to make preparations for the impending MAS raid. In fact he had no knowledge that there was going to be a raid. He also denied that he asked members of his staff including Chen Ah Kong or Rosalind Lee to lie to the MAS. On the day of the raid he was in the Philippines.

After the MAS raid business at BVC was as usual. The system of business did not change in any way.

On January 19, 1983, Sylvia Leung and Lee's father came to Singapore to get more margin deposits. Loh had the impression that they had come to borrow money and he was not happy about this as BVC had margins in Hong Kong. At their meeting Alan Wong was also present. He wanted to know the accounts between BVC and BVF and was annoyed when Sylvia Leung was not able to tell him. He told Sylvia Leung that she should have brought the accounts with her as she had come to see BVC's accounts. He told Sylvia Leung that after the accounts were settled all future orders would be placed with a Singapore firm instead of BVF. He emphasised that he was the first to mention the termination of business between BVC and BVF and told Sylvia Leung that he would do so through his solicitors.

A letter of termination of the Agreement sent by BVC's solicitors dated January 19, 1983, (Ex D.33) was sent to BVF giving one month's notice of such termination to take effect on February 19, 1983. BVC's solicitors received a letter dated February 1, 1983, from BVF's solicitors in Hong Kong (Ex D.34) agreeing to the termination.

On February 18, 1983, he saw Sylvia Leung again in Singapore but he did not know the reason for her visit. He asked her to return the margins that BVC had with BVF as business was to be terminated on the following day. He had left firm instructions with his staff that Sylvia Leung was not to see the accounts or touch the telex machines. However, on February 19, 1983, he was informed that Sylvia Leung had stealthily used the telex. He proceeded with some of his staff to see Sylvia Leung at the Dynasty Hotel. He asked her to return the copy of the telex but she refused. There was an argument which resulted in the police being called. They all went to the police station. There he asked Vincent Lim to make the report.

He then telephoned Lee in Hong Kong and asked how Lee was going to settle the matter of the false telex sent by Sylvia Leung. Lee said that they should talk over the matter slowly. Lee first said "don't charge Sylvia" and he would send the margins to Singapore and they could settle the matter slowly. No agreement was arrived at and he subsequently commenced civil proceedings against BVF in respect of a claim of $763,211.63, the amount of the false orders sent by Sylvia Leung to Hong Kong on February 19, 1983.

Loh reiterated that he was never in charge of the trading operations at BVC and that it was the Hong Kong persons including Lee, Kelvin Ngai and Ho Yuen Tin who did. It was Lee who was all along managing the operations. He had no reason to suspect that the orders at BVC were not being sent to BVF for execution and denied deceiving any clients or brokers of BVC. He was never told by Lee anything of bucketting or marrying or crossing orders. As BVC turned over millions of dollars worth of gold, Abdullah b. Abdul Hadi (who was only an office boy at State Carriers) and Chen Ah Kong were not "mentally equipped to do bucketting against clients."

Loh stated that he was never dishonest in any way when he dealt with clients or brokers and he never had a single complaint from any of his clients at BVC. He stated that some of the clients including Madam Chew (PW 15), Michael Choo (PW 14), Lee Tow Kiat (PW 16) and William Tsai, had previous experience in gold trading and could not easily be deceived.

In respect of the CBT Charges, Loh maintained his innocence. His evidence was that most of these monies were amounts given to him by Lee for his gambling debts. Lee had, since 1981, gambled "big" between $100,000 and $200,000 and the two of them had indulged in various forms of gambling and had gambled in Singapore, Hong Kong and Taiwan. Lee had borrowed $70,000 or $80,000 and at times over $100,000 from him at the race course. From February to August 1982 the total amount Lee owed him was S$1.2 million.

Loh pointed out that whenever BVC paid out the amounts set out in the CBT charges, margin receipts were issued. Lee repaid his gambling debts in instalments. He paid some in Hong Kong and in Singapore. He would also "pay back part of BVC's margins sent to Hong Kong and make up the balance." When he received money he therefore believed it was his money repaid to him by Lee. Any money he received through Lee or BVF or BVC he thought was repayment of Lee's gambling debt to him.

Loh gave more details in respect of the charges that he jointly faced with Alan Wong. According to him in late August 1982 there was a gambling session which went on for three to five days at the Dynasty Hotel, Singapore. Lee and others from Hong Kong and Taiwan participated. Lee lost to almost everybody and his losses totalled over $100,000. Loh won $20,000 to $30,000. The losses of Lee were "put in my account as Lee did not know the others well." Lee later asked if he could "take some money from BVC first and pay the debts."

Lee asked if there could be a distribution of the profits of BVC. Loh told Lee to speak to Alan Wong as he could not make the decision. Loh had no objection to the payment if there was money.

On the following day Loh received $80,000 (subject of the tenth CBT charge against Loh). He thought that it represented profits made by the Company. He paid the $80,000 into his DBS account. He denied going with Lee to cash the cheque and giving Alan Wong part of the money. He denied seeing the cheque Ex P.60 for $200,000 or the bank payment voucher Ex P.60A, which in fact stated that the $200,000 (which had been distributed amongst the three directors) was a payment to Lee alone "for returning to Loan Account."

In 1982, Loh and Lee decided to set up another gold trading company in Manila called Broadview (Philippines) and in connection with this Alan Wong had paid 2 million pesos (S$517,000) towards the capital of Broadview (Philippines).

The two of them were to repay Alan Wong later for this transaction and this was done.

In respect of the fourteenth charge against Loh (third and fourth charge against Alan Wong) Loh admitted that the $145,000 cash credited to his account on December 14, 1982 (DBS deposit slip Ex P.66A) included the $133,330 stated in the charge.

Loh gave the following explanation. He had nothing to do with the signing of any document relating to this payment. After Sylvia Leung arrived from Hong Kong, Lee telephoned him and asked if he could get an advance from the Company. Loh said that he would speak to Alan Wong and informed Alan Wong of Lee's request. Alan Wong said he would decide after Sylvia Leung had arrived. He did not know what happened but subsequently Sylvia Leung handed him the $133,000 which he understood to be "in advance from BVC."

Loh denied having been dishonest with monies entrusted to BVC.

DEFENCE OF ALAN WONG

Alan Wong testified that in April 1981, whilst he was working as an advocate and solicitor with Lee & Lee, he had acted in the incorporation of BVC. He had also applied for the company to be an associate member of the Gold Exchange of Singapore.

In December 1981 he was informed that there was a dispute between Loh and Lee as regards Kelvin Ngai. He was asked by Loh to go to the office of BVC to settle the dispute. Loh had accused Kelvin Ngai of dishonesty. Lee told Loh that he had employed Kelvin Ngai and would be responsible for all the deeds of Kelvin Ngai, as a result of which an indemnity was prepared and executed by Lee on December 15, 1981.

That same day (December 15, 1981) following a telephone call from Lee he met Lee at the Cockpit Hotel Coffee House at about 10 p.m. Lee told him of the strained relationship between Lee and Loh. Lee invited him to become a director and chairman of BVC and would transfer 10% of his shares in BVC to him and would ask Loh to do the same. Lee said that he would be paid director's fees of $5,000 per month.

Alan Wong emphasised that that night at the Cockpit Hotel Lee did not disclose to him that the paid-up capital of BVC was false or that BVC was involved in bucketting. Lee also did not tell him of the financial situation of BVC. He was only told that Lee had made a market survey in respect of gold trading in Singapore and that BVC, if properly run, "would have potential."

On December 16, 1981, Loh and Lee transferred 100,000 shares each to Alan Wong and in December 1982 a further 200,000 were similarly transferred to him.

Alan Wong maintained that to his knowledge BVC had not been involved in bucketting clients' orders and that he did not at any time suspect that BVC was doing so. He knew little of BVC's trading operations. He had had no discussions with the BVC staff about the trading operations. Alan Wong denied that when Kelvin Ngai visited him with Ho Yuen Tin in January 1982, they had discussed the legality of bucketting at BVC. Nor had he discussed this matter with Rosalind Lee in August 1983.

On June 19, 1983, Alan Wong wrote on behalf of BVC to BVF (Ex D. 33) on the instructions of Loh, giving notice of termination of agreement between the two Companies. On the following day he gave the letter to Sylvia Leung at the Mayflower Restaurant at Shenton Way and she signed an acknowledgment on the duplicate of the letter. She remarked that it would take time to render the accounts as required by BVC. BVF subsequently replied to the letter D. 33 through their solicitors on February 1, 1983 (Ex D. 34). When BVF failed to return the margin deposits, legal action was commenced against the Company in Hong Kong. As BVC has been wound up the action is in abeyance.

Alan Wong also stated that BVC had also taken legal action against the clients who did not make good their losses. Legal action was commenced against Madam Chew Swee Poh in 1982 in Singapore.

The defence of Madam Chew was that BVC had bucketted her orders and her solicitors had applied for discovery, before pleadings, of all the trading orders of Madam Chew. Copies of her application and affidavit were sent to BVC for instructions but Alan Wong received no response. Alan Wong had further consulted American solicitors to determine the existence of confirmatory telexes from the floor of COMEX.

In respect of the 1st charge against Alan Wong,

his evidence was that in August 1982 he visited Loh, Lee, Kenny Hioe and a few others at the Dynasty Hotel in Singapore. They were playing cards. He was told by Loh that Lee had lost $80,000 during the gambling session and Lee wanted to borrow money from BVC to pay off his debt but Loh was not agreeable unless all the directors drew from the profits of the Company in proportion to their shareholdings. Alan Wong did not object to Loh's proposal.

Alan Wong admitted to being a signatory to the cheque Ex P. 60 for $200,000 which was made out to Lee. He agreed that he had signed the bank payment voucher Ex P. 60A which falsely stated that the payment of $200,000 was to Lee and was a return of the loan to Lee. His explanation was that Rosalind Lee had asked him to sign both the cheque and the payment voucher. He had asked her why they had been prepared in "this way" and she told him that she had been instructed by Lee to prepare them. He stated that when he signed the cheque and the payment voucher he had no reason to suspect that there was no such loan account in BVC from which the amount could be paid off. Loh had mentioned that the sums were paid out as distribution of profits. He did not know if there had been any distribution of profits before this.

In respect of the 2nd charge of C.B.T. of $169,713.17, Alan Wong's evidence was that in July 1982 there were proposals for BVC to set up gold trading operations in Malaysia and in the Philippines. He went to Manila with Loh to set up Broadview (Philippines) Incorporated. The paid-up capital of Broadview (Philippines) which was to be 2 million pesos was to come from Singapore. Alan Wong said he sent S$513,774.50, the equivalent of 2 million pesos to the Philippines from his DBS account (see Ex D. 10) on August 13, 1982. He maintained that although the 2 million pesos were advanced by him, the investment in BV (Philippines) was intended to be "an investment of BVC and not of the three directors personally." He had advanced these monies at the request of Lee and Loh.

On October 8, 1982, when he was with Loh and Lee in the Philippines, he asked for the repayment of the monies he had advanced to BV (Philippines). Lee told him that he would sort out the payment in Hong Kong on the following day.

On the morning of October 9, 1982, he met Lee in the office of BVF and asked about the repayment. Lee then informed him that he had earlier on deposited HK$1,046,783.63 into Alan Wong's personal account with the Hang Lung Bank in Hong Kong. Alan Wong stated that when Lee told him that he felt it was "rather strange" when he first heard it but Lee showed him a bank pay-in-slip (Ex P. 63L) confirming the deposit into his account.

Alan Wong maintained that it was on October 9, 1982, that he came to know of a Hong Kong Company called Linkrich. He was invited to be a director of that Company by Lee and Sylvia Leung and had agreed. Loh similarly became a director of Linkrich. Lee and Loh were to be the signatories of Linkrich's cheques. Sylvia Leung had showed him the application forms for the opening of a bank account for Linkrich which Lee had signed and he and Loh signed the forms in front of the bank officer.

Lee then asked Alan Wong for a cheque for the same amount of HK$1.04 million that had been paid into his account to be used as the paid-up capital of Linkrich. He drew a cheque for that amount and handed it to Sylvia Leung. This cheque was to be deposited into Linkrich's bank account to be opened at the Hang Lung Bank. Lee told him that after the $1.04 million had been transferred to Linkrich account Alan Wong could draw a cheque for HK500,000 in respect of his disbursement to Broadview (Philippines). At the Hang Lung Bank his cheque was cleared into the account of Linkrich and he then issued a cheque for HK500,000 (Ex P. 61) on the account of Linkrich. He had made out a cash cheque as the bank officer had told him that it would facilitate the transfer into his personal account. He denied the evidence of Sylvia Leung that he had made out this cash cheque on Loh's advice so that the source of the money could not be traced. The sum of HK500,000 (S$169,713.17) was eventually remitted to his DBS account in Singapore.

Alan Wong denied ever receiving the sum of $16,340, the subject matter of the *Third Charge*.

In respect of the *Fourth Charge* of CBT of $37,000, Alan Wong admitted that he had received the sum. His version was that in the first week of December 1982 Sylvia Leung came to Singapore from Hong Kong and asked for a loan from BVC as BVF had cash flow problems. Loh was reluctant to give any loan but upon Sylvia Leung's pleas it was agreed that a loan of HK$400,000 was to be advanced to BVF. Subsequently, Sylvia Leung wanted more. Loh then informed her that pay-

ments made to Lee, Loh and Alan Wong, in drawings, had to be proportionate to the director's shareholdings in BVC.

On December 13, 1982, upon receipt of a telephone call from Rosalind Lee, Alan Wong went to BVC where he was asked to sign two cheques for $37,000 (Ex P. 65) and $150,000 (Ex P. 66). Rosalind Lee informed him that these two cheques had been prepared on the instructions of Loh and that the cheque for $37,000 was meant for him. He understood that the cheque of $37,000 was his share of the drawings made in the proportion of 40-40-20 as it was "roughly half of half of $250,000." He had since realised that on such a calculation he should in fact have received $37,500. As he needed cash and he was busy he gave the cheque P. 65 to Rosalind Lee to cash it for him. On the following day, Sylvia Leung handed him cash of $37,000. When reminded by his counsel that Lee had in fact not received $75,000 from the $150,000 cheque P. 66 Alan Wong's response was that "my presumption about the fact of distribution of profits must be wrong."

Alan Wong maintained that no allegation of dishonesty had ever been made against him in his life.

Evidence Of The Defence Witnesses

Three witnesses were called by Loh: Zee Sei Leung (DW 3), Au-Yong Mei Yuk (DW 4) and Wilfred Douglas Anthony (DW 5). The trial judge was of the view that none of these witnesses were able to support the defence of either Loh or Alan Wong.

The Appeal Of Loh Shak Mow

The first point taken by Mr. Gray for the appellant is that the trial judge ought to have found no case to answer.

Counsel made the same submission on *Haw Tua Tau's* case as he did before the trial judge, submitting that the direction given by Lord Diplock as to the test to be applied when dealing with a submission of "no case to answer" is clearly wrong and that despite Lord Diplock's direction the duty of the Court to determine whether the prosecution has established a *prima facie* case beyond reasonable doubt remains.

This point can be disposed off shortly. I must regard myself for the purpose of this appeal bound by the decision of the Singapore Court of Criminal Appeal in *Abdul Ghani* v. *Public Prosecutor*[2] that the directions of the Privy Council are not *obiter* and are binding on all courts in Singapore. The trial judge was right in applying the test laid down by the Privy Council in *Haw Tua Tau's* case and he was in my view, correct that on the totality of the prosecution evidence the prosecution had established a *prima facie* case.

The next point taken by counsel is that there was wrongful admission of secondary evidence.

The complaint is that the trial judge failed to accede to the repeated objections of counsel for the appellant that secondary evidence of the contents of documents was being given contrary to the Evidence Act, sections 61 to 65. Documents, telexes, bank accounts and orders in Hong Kong concerning BVF and Lee Kwong Fai should be properly proved. There was abundant evidence that vital documents existed and were available but they were not produced with the result that the cross-examination was hopelessly impeded. The defence were seriously disadvantaged in their attempt to show that if there was dishonesty it was in Hong Kong.

Counsel said that an important part of the prosecution case was that incriminating copies of telexes were destroyed in Singapore on the orders of Loh. Much emphasis was placed on the contents of the destroyed telexes by the prosecution and the trial judge attached great importance to this topic to the detriment of Loh. The originals of these telexes existed in Hong Kong but were never produced.

Counsel for the respondent said that the documents that the appellants requested for were raised during cross-examination of the prosecution witnesses. Two months before the trial the prosecution made available to the defence whatever documents it had in its possession and in fact instructing solicitors for both the appellants came and inspected all the documents that were in the possession of the prosecution. The documents that were available in this case was massive but there was no communication whatsoever made to the prosecution that the defence required all the documents of BVC. The prosecution says that whatever documents that were available and which were consistent with the evidence of the witnesses were produced. The prosecution did not in any way hide away documents which were in its possession.

Counsel for the appellant replied that it was wrong to suggest that no objection was taken to the admissibility of secondary evidence as to the contents of documents until cross-examination. He said that as soon as the matter arose concerning telexes received in Hong Kong objection was made and the objection was repeated and later on cross-examination of witnesses it was proved that original documents existed in Hong Kong and could be produced at the start.

Counsel for the respondent did not really argue that the secondary evidence was not wrongly received.

What I have to consider is whether the reception of the inadmissible evidence influenced the mind of the trial judge so seriously as to lead him to a conclusion which might have been different but for its reception. There are two points for consideration, first, whether the reception of the inadmissible evidence has in fact occasioned a failure of justice and, secondly, whether if it is excluded there was sufficient evidence to justify the finding of the trial judge.

The next point of Mr. Gray is that the CBT charges were misconceived and inappropriate. The argument of counsel is shortly this. The charges alleged that the appellant being a director of BVC and having dominion over certain property to wit, money belonging to BVC, committed criminal breach of trust in respect of it. The initial capital was fictitious and what little there might have been was quickly lost, long before the first CBT charge in February 1982. The only source and flow of money through BVC was its involvment in the cheating of clients. The money which passed through BVC was "stolen money." It was loot from the conspiracy and not money belonging to BVC. BVC had no right to it and no question of entrustment could arise. There was no money owned by BVC which could form the basis of a CBT charge.

With all due respect to counsel I do not agree with the argument advanced by him. There can be no doubt that the money that was paid to BVC by its clients became the property of BVC and that the directors had dominion over the property. The clients knew that when they paid the money to BVC it was placed there for the purpose of being under the control of BVC.

Mr. Gray says that if BVC had money of its own, it was always able to meet its obligations to clients with its own money and submits that then the drawings of its directors were not criminal breach of trust.

There is no substance in this submission. The appellant and Lee Kwong Fai were engaged in a conspiracy to cheat and subsequently from the proceeds of the cheating, which were received by BVC, the appellant and Lee Kwong Fai had secreted monies out of BVC by disguising them as margin payments to BVF and putting them into their respective bank accounts. The issue here was not whether BVC was able to meet its financial obligations. The issue was whether the appellant dishonestly misappropriated the monies. On the evidence the trial judge found that the appellant dishonestly misappropriated the monies and the appellant was therefore guilty of criminal breach of trust.

It is submitted that the trial judge's findings of fact were against the weight of evidence and wrong. Most of the witnesses were tainted, biased and untruthful.

Mr. Gray dealt extensively with the evidence of most of the witnesses for the prosecution and highlighted its inadequacies and contradictions and he dealt at length with the Grounds of Decision criticising the trial judge's findings of fact that they were against the weight of evidence and wrong.

Tbe complaints of the appellant are many. The main ones are:-

(a) The trial judge believed the principal prosecution witnesses, particularly Lee Kwong Fai, Sylvia Leung, Kelvin Ngai, without considering the various discrepancies, contradictions and incredible features in their evidence.

(b) The trial judge did not consider at all the defence that the prosecution witnesses from Hong Kong, principally Lee Kwong Fai, Sylvia Leung and Kelvin Ngai, all had grudges against the appellant and hence motive to give highly incriminating and possibly false evidence against the appellant.

(c) The trial judge failed to consider the submission by the appellant that if indeed he had been guilty of cheating and criminal breach of trust, he would not have reported Sylvia Leung to the Police in February 1983 for cheating by forgery and thus taken the risk of the police investigating into the affairs of BVC.

(d) The trial judge failed to consider the documentary evidence adduced by the appellant to show that the appellant believed that BVF was actually carrying on trading on exchanges for the clients of BVC and that if any cheating by bucketting of orders was being carried

out, it was either not made known to the appellant or was done without his knowledge.

(e) The trial judge erred in disbelieving the appellant's evidence that the photocopying of accounts and books of BVC in 1982 was done for the benefit of a computer firm entrusted with computerising the records of BVC when the prosecution failed to call upon the computer firm personnel to give evidence although they had been interviewed by the police and by the prosecution. An adverse inference should have been drawn as a result of that failure.

(f) The trial judge erred in concluding that the offences of criminal breach of trust would have been made out even on the appellant's own evidence that he had received monies from BVC in settlement of Lee Kwong Fai's personal gambling debts. The appellant's defence to the CBT charges was that the cheques and telegraphic transfers drawn on BVC's bank accounts were payments to BVF in Hong Kong as marginal deposits. Lee Kwong Fai, the director of BVF, instructed Ho Yuen Tim and others to use part of these monies to repay gambling debts to the appellant. If an offence was disclosed by this, this was Lee Kwong Fai's criminal breach of trust in respect of money he had dominion over as agent of BVC and not criminal breach of trust by the appellant of BVC's monies.

(g) The trial judge failed to consider the submission in law that if the offence of abetment of cheating was disclosed by the evidence, BVC was a conduit through which money obtained from clients "flowed" into the hands of the appellant and its other directors. Therefore, the appellant having been found guilty of abetment of cheating should not in addition have been found guilty of the offence of CBT in respect of the monies of the company, which itself, if the prosecution evidence was believed, fruits of another offence in the first place.

(h) The trial judge did not give sufficient consideration to the evidence adduced by the appellant.

(i) The conviction is against the weight of the evidence, as by his evidence and by the discrepancies in the prosecution's evidence, a reasonable doubt was cast on the prosecution's case.

The trial judge had given the most careful consideration to the evidence adduced by the prosecution and the defence. He was aware that the prosecution case pivoted on the evidence of accomplices. He had warned himself of the dangers of convicting the appellant on the evidence of accomplices. He had no reason to disbelieve the prosecution witnesses. The evidence of the witnesses from both Hong Kong and Singapore was consistent in all material aspects and was supported by numerous documentary exhibits. Even if the appellant's allegation was true that the Hong Kong witnesses had reasons to lie against him, there was no reason why all the witnesses from BVC, most of whom had been brought over by the appellant from his previous Company, State Carriers, should lie against him. The appellant was unable to suggest any cogent reasons why they should all lie under oath and have him unjustly convicted and punished. The appellant also alleged that the clients of BVC were telling lies when they testified. In fact his allegation was that all the prosecution witnesses were engaged in a conspiracy to lie against him.

With all the massive evidence adduced by the prosecution of cheques made out to Lee Kwong Fai, cash cheques cashed in Singapore, false bank payment vouchers and receipts, and of monies taken by the directors in proportion to their shareholdings and the absence of Company resolutions to support any legitimate distributions of company profits the trial judge could not but accept the evidence of the prosecution witnesses.

Mr. Gray submits that the documentary evidence adduced by the appellant, principally the letters Exs D.33, D.34 and D.35, show that the appellant believed that BVF was actually carrying on trading on Exchanges for the clients of BVC and that if any cheating by "bucketting" of orders was being carried out, it was either not made known to the appellant or it was done without his knowledge.

The evidence adduced by the prosecution clearly showed that the appellant had full knowledge of BVC's operations.

The documentary evidence D.34 and D.35 by themselves would not show that the appellant in fact believed that BVF was actually carrying on trading on Exchanges for BVC. The facts leading to the writing of these letters have to be considered to determine whether the documents were true and could be relied upon. The trial judge was entitled to consider apart from these documents whether other evidence adduced showed that there was no trading between BVF and BVC. There was ample evidence on the records to show that the appellant had knowledge of bucketting and that the orders of clients were not put on the Exchange.

The prosecution evidence was that there had been no trading whatsoever between BVC and BVF and in fact these margins purportedly sent or paid by Lee Kwong Fai right at the inception was false and was never paid. The documents in BVC were tailored. The figures given therein were false and were in fact used to cover up the bucketting operations.

The evidence was that immediately after the MAS raid on BVC the Company was able to continue business the very next day. If the documents had not been photostated prior to the raid it was virtually impossible for the Company to begin business immediately after the raid. It would take time to go to the MAS to get all the documentation and to get them photostated.

The appellant said that the photostating was done for the benefit of the computer firm entrusted with computerising the records of BVC. The prosecution witness said that it was done in anticipation of the MAS raid. The appellant's story that this photostating was done for the benefit of the computer firm was not supported on the evidence. The prosecution was not bound to call upon the computer firm personnel to give evidence. If the appellant wished to establish that the photostating was requested by the computer firm and that the appellant ordered the photostating for that reason the defence should have called the computer firm personnel to establish that fact.

Having regard to the evidence, the trial judge was entitled to find that the appellant and Lee Kwong Fai were in fact engaged in a conspiracy to cheat and that subsequently they secreted the proceeds of the cheating by disguising them as margin payments to BVF and then obtaining the money unlawfully through all these means and putting them into their respective bank accounts as evidenced by the bank documents.

The trial judge has not erred in concluding that the offences of CBT would have been made out even on the defence of the appellant that he had received monies from BVC in settlement of Lee Kwong Fai's personal gambling debts. The monies clearly belonged to BVC and could not be used by Lee Kwong Fai to pay for his own personal gambling debt.

As I have said the appellant and Lee Kwong Fai were engaged in a conspiracy to cheat and that subsequently they secreted out the proceeds of the cheating by disguising the receipt of the monies by them by creating false margin receipts and stating in the payment voucher that these were payments to BVF as margins, trading losses, remittances to Hong Kong and returns to Directors' loan account. Most of the cheques drawn were cash cheques and encashed in Singapore. The evidence showed that half the amounts stated on the cheques were given to the appellant which he immediately credited into his bank account within minutes of its withdrawal. If appellant's allegations that Lee Kwong Fai was repaying his gambling debts were true, why only half the amounts were used to settle the gambling debts when the alleged amount owing to the appellant was substantial. No explanation was given by the appellant. The truth is that the appellant and Lee Kwong Fai were distributing the proceeds of the cheating equally between them.

Mr. Gray raised the point that the CBT charges were unfair, that they merely duplicated the cheating charges. On the evidence adduced distinct offences of abetment of cheating and CBT were committed by the appellant. The abetment of cheating offences related to the clients of BVC and the CBT charges related to the monies belonging to BVC. The acts alleged constituted offences falling within two separate definitions of law by which offences are defined or punished. The provisions of the Criminal Procedure Code permit the appellant to be charged with and tried at one trial for each of those offences.

The trial judge gave reasons for rejecting the appellant's evidence. The trial judge gave anxious consideration to the evidence of the appellant and his witnesses which raised no doubt in his mind as to the guilt of the appellant.

The law regarding the functions of an appeal court when dealing with a question of fact in which questions of credibility are involved is clear. In an appeal from the decision of a trial judge based on his opinion of the trusthworthiness of witnesses whom he has seen, the appeal court must, in order to reverse not merely entertain doubts whether the decision below is right but be convinced that it is wrong (*A.D. Caldeira* v. *F.A. Gray*,[3] a Privy Council case).

Having regard to the evidence I am not convinced that the decision of the trial judge is wrong.

The appeal of Loh Shak Mow against conviction is dismissed.

It is submitted that the sentences imposed were manifestly excessive. There is no doubt that the appellant was deeply involved from the start but the principal planners and operators of the fraud were the people from BVF, the principal prosecution witnesses from Hong Kong. Lee Kwong Fai was the evil genius and he had made a fortune from the offences and he has gone scot free.

I am of the view that the sentences imposed were manifestly excessive in the circumstances. The sentences are set aside and I substitute a sentence of two years' imprisonment on each charge, the sentences on the first two charges to run consecutively and the sentences on the other charges to run concurrently, making a total of 4 years' imprisonment.

THE APPEAL OF ALAN WONG

The first ground of appeal is that the trial judge erred in ordering a joint trial of the charges against Loh Shak Mow of abetment of cheating by conspiring to cheat under sections 109 and 420 of the Penal Code, with the charges against the appellant of criminal breach of trust as agent under section 409 of the Penal Code.

The appellant was charged with four charges of criminal breach of trust as agent in his capacity of director and chairman of BVC having dominion over money belonging to BVC, under section 409 of the Penal Code. He was convicted as charged on charges (1), (3) & (4) and convicted under section 411 of the Penal Code for dishonestly retaining stolen property, namely $169,713.17 in respect of charge (2).

The prosecution applied for the appellant and Loh Shak Mow to be jointly tried. Counsel for the appellant objected to the CBT charges against the appellant being tried with the abetment of cheating charges against Loh Shak Mow. After hearing arguments the trial judge granted the application.

The DPP in his submission on his application for a joint trial said that although the appellant was not involved actively in the trading of BVC he knew of the operations. He said that the CBT charges against the appellant were consequences of the cheating charges. The prosecution would show that monies which were obtained from the conspiracy were shared by the three directors. There was thus a unity of purpose and a unity of action resulting in the criminal breach of trust.

After saying all that the DPP said that what was alleged against Loh Shak Mow would apply to Alan Wong even though the latter was not charged as a conspirator. The evidence of conspiracy was against both but in the exercise of his discretion the Public Prosecutor was proceeding against Alan Wong only in respect of the CBT charges. The DPP said that the court could amend the charges or sever the hearing during the trial.

The DPP also said that he would allege in the charges that Alan Wong was a conspirator but he was not charging Alan Wong for that and that his was a complicated case.

When the joint trial commenced the DPP applied to amend the abetment of cheating charges against Loh Shak Mow not to name Alan Wong as a conspirator but to name Lee Kwong Fai and "divers others" as conspirators. That application was granted.

At the outset Loh Shak Mow was charged with conspiring with "others unknown." Only one amendment was made during the trial namely to allege that Lee Kwong Fai and "divers others" were conspirators. No application at any stage of the trial was made by the DPP to charge that the appellant was a conspirator or even to name him in any conspiracy charges against Loh Shak Mow.

At the close of the case for the prosecution counsel for the appellent tendered a written submission on the question of the joint trial and requested the trial judge to reconsider his earlier ruling. The trial judge refused to listen. His notes read: "Kan not permitted to address court on whether an earlier decision of the Court on joinder of trial was wrong, as this is now a question solely for an appellate court." The trial judge was wrong in refusing to reconsider his decision.

The only provision which authorised joint trial of offenders under certain specified circumstances is section 175 of the Criminal Procedure Code.

The trial judge gave no reasons for ordering a joint trial either when the application for a joint trial was made or in his Grounds of Decision. It was for the trial judge to decide whether the two accused should be tried together or separately. The discretion must be exercised judicially.

The usual tests applied to decide whether different acts are parts of the same transaction (to bring it within section 175 of the Criminal Procedure Code) are proximity of time, unity of place, unity of purpose or design and continuity of action (*Public Prosecutor* v. *Loh Ang Sing*[4]).

There were three groups of charges: (1) four CBT charges against the appellant; (2) fourteen CBT charges against Loh Shak Mow; (3) twenty-eight charges of abetment of cheating against Loh Shak Mow. The prosecution proceeded on six of

the twenty-eight abetment of cheating charges against Loh Shak Mow. The rest were stood down.

The date of deceiving alleged in the first of the twenty-eight abetment of cheating charges against Loh Shak Mow was January 5, 1982, and the date of the twenty-sixth charge was August 17, 1982. The dates of deceiving in twenty-six of twenty-eight charges against Loh Shak Mow were before the date of the alleged criminal breach of trust (August 25, 1982) by the appellant in the first charge against him. In fact all the six charges of abetment of cheating which the prosecution elected to proceed against Loh Shak Mow were before the first CBT charge against the appellant. It is not disputed that Loh Shak Mow and Lee Kwong Fai shared the profits 50/50 until August 25, 1982, and that the appellant did not know this and that the appellant did not receive any share of the profits before August 25, 1982. There is no proximity of time and no unity of purpose and continuity of action.

Conspiracy to cheat or actual cheating was not material to the question whether the appellant committed criminal breach of trust. The CBT charges against the appellant were not dependent on there having been cheating at BVC nor on the source of the funds at all. Had BVC's funds been acquired perfectly legitimately the directors who dishonestly misappropriated any part of it could have been charged with criminal breach of trust.

The trial judge did not consider the case on the basis of the evidence admissible against each accused separately. He considered the case as if he was trying charges of conspiracy in which the acts and statements of all the alleged conspirators pursuant to the conspiracy were admissible against both the accused.

The result of the joint trial was that the appellant was subjected to an unnecessarily long and complicated trial lasting some eight weeks when evidence was adduced of cheating or attempted cheating or conspiracy to cheat which was not probative of the offences with which the appellant was charged and on which he was unfairly and improperly cross-examined by the DPP as to the offences with which he was not charged, with the result that the trial judge did not consider the case on the basis of the evidence admissible against each accused separately. He treated the appellant as a conspirator in a conspiracy with which he was not charged and in which he was not named.

The consequence was that the appellant was confronted by grossly prejudicial material which influenced the trial judge, adversely to the appellant, when he came to consider the disputed evidence relating to the charges against the appellant. With the result that the trial judge failed to consider adequately or properly the essential question whether it was proved by the prosecution that the appellant in receiving the monies from BVC on each occasion charged did so with the dishonest intention to cause wrongful loss to BVC.

A joint trial should not have been ordered as it was not fair and just to the appellant and the joinder has occasioned a failure of justice. I am impelled to the conclusion that the appellant's convictions must be quashed. I allow the appeal and quash the convictions and sentences.

The appellant has been subjected to an unnecessarily long and complicated trial of some eight weeks. He was unfairly and improperly cross-examined as to the offences with which he was not charged. He was confronted by grossly prejudicial and irrelevant evidence. At the end of it he was convicted and sentenced to twelve months' imprisonment on the basis that he was a party to the whole conspiracy to cheat with which he was not charged and in which he was not named. He must have spent a most miserable anxious year of his life waiting for the appeal to be heard. He had to leave the legal firm where he was a partner and had a lucrative practice. I am told that he practised on his own and that soon came to an end as he had few clients and that he is now not doing anything. He has endured quite enough. I do not order a retrial, to do so would be inequitable.

Order accordingly.

Solicitors: *Leo Fernando; R.C.H. Lim & Co.*